IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING: DEFENSE MOTION**
v.	)	**TO DISMISS FOR FAILURE TO**
	)	**STATE AN OFFENSE**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
HHC, U.S. Army Garrison	)	
Joint Base Myer-Henderson Hall	)	DATED: 26 April 2012
Fort Myer, Virginia 22211	)	

Defense moves this Court to dismiss the Specification of Charge I for failure to state an offense. Alternatively, Defense moves to dismiss the Specification of Charge I because the inclusion of the term "indirectly" in Article 104, UCMJ, renders that provision unconstitutionally vague and substantially overbroad. Government opposes. The Government moves the Court to adopt the instructions for Article 104(2) (Giving Intelligence to the Enemy) in *Department of the Army Pamphlet, 27-9, Military Judge's Benchbook* (Benchbook). After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

Factual Findings:

1. The Government provided particulars regarding the specification of Charge I in response to the Defense question, "How did PFC Manning knowingly give intelligence to the enemy?" The Government responded "PFC Manning knowingly gave intelligence to the enemy by transmitting certain intelligence, specified in a separate classified document, to the enemy through the WikiLeaks website."

2. In the specification of Charge I, the accused is charged with Giving Intelligence to the Enemy in violation of Article 104(2). The specification alleges that between on or about 1 November 2009 and on or about 27 May 2010, PFC Manning, without proper authority, knowingly gave intelligence to the enemy through indirect means. The specification follows the model specification in the Manual for Courts Martial (MCM) Part IV, paragraph 28(f)(3)(Article 104- Aiding the Enemy Giving Intelligence to the Enemy).

The Law: Article 104

1. Article 104(2) makes it a crime for "any person who, without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly."

2. Article 104b(4) provides the following elements for the offense of Giving Intelligence to the Enemy:

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(a) that the accused, without proper authority, knowingly gave intelligence information to the enemy, and;

(b) that the intelligence information was true or implied the truth, at least in part.

In addition, MCM Part IV, Paragraph 28b(5)(a)-(c) provide the following explanation:

(a) *Nature of offense:* Giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make information valuable to belligerents. This intelligence may be conveyed by direct or indirect means.

(b) *Intelligence:* "Intelligence" imports that the information conveyed is true or implies the truth, at least in part.

(c) *Knowledge:* Actual knowledge is required but may be proved by circumstantial evidence.

3. Giving Intelligence to the Enemy under Article 104(2) requires actual knowledge by the accused that he was giving intelligence to the enemy. MCM, Paragraph 28c(5(c)). This is true whether the giving of intelligence is by direct or indirect means. A person cannot violate Article 104 by acting inadvertently, accidentally, or negligently. *U.S. v. Olson,* 20 C.M.R. 461 (A.B.R. 1955).

4. The Military Judge's Benchbook provides instructions for Article 104(2)(3-28-4). Those instructions do not include instructions defining "knowledge" or "indirect means".

The Law: Failure to State an Offense.

The military is a notice pleading jurisdiction. A charge and its specification is sufficient if it (1) contains the elements of the offense charged and fairly informs an accused of the charge against which he must defend; and (2) enables the accused to plead an acquittal or conviction in bar of future prosecutions for the same offense. *U.S. v. Fosler,* 70 M.J. 225 (C.A.A.F. 2011). A motion to dismiss for failure to state an offense is a challenge to the adequacy of a specification and whether the specification "'alleges, either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.'" *United States v. Amazaki*, 67 M.J. 666, 669, 670 n.8 (A. Ct. Crim. App. 2009) (quoting *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)).

The Law: Void for Vagueness.

1. A motion to dismiss a specification as being "void for vagueness" implicates the Due Process clause of the Fifth Amendment. To overcome a "void for vagueness challenge", a statute must be reasonably clear so as to provide warning of the type of conduct which is proscribed and provide standards sufficiently explicit to prevent arbitrary and capricious application. A statute

is impermissibly vague if it "(1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or even encourages arbitrary and discriminatory enforcement." *U.S. v. Shrader,* 2012 WL 1111654 (4th Circuit, 4 April 2012) *quoting Hill v. Colorado,* 530 U.S. 703, 732 (2000); *U.S. v. Amazaki,* 67 M.J.666 (Army Ct. Crim. App. 2009). "[T]he more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." Courts also consider any judicial or administrative limiting construction of a criminal statute in determining whether it is unconstitutionally vague. *Kolendar v. Lawson*, 461 U.S. 352, 355, 357, 358 (1983).

2. A "knowing" scienter requirement mitigates a law's vagueness especially with respect to actual notice of the conduct proscribed. *U.S. v. Moyer,* 2012 WL 639277 (3rd Cir. 2012).

The Law: Substantially Overbroad.

1. A statute is facially overbroad when no set of circumstances exists under which it would be valid. *United States v. Salerno,* 481 U.S. 739, 745 (1987). The Defense does not challege Article 104(2) as facially overbroad.

2. In the First Amendment context, a statute is "overbroad" when a substantial number of its applications are unconstitutional when compared with the statute's plainly legitimate sweep. *U.S. v. Stevens,* 130 S. Ct. 1577 (2010).

Conclusions of Law: Failure to State an offense.

1. The general intent required by Article 104 is knowledge. This general intent is alleged in the specification.

2. Knowledge is a recognized *mens rea* to provide an evil state of mind. *U.S. v. Morrisette,* 342 U.S. 246 (1952) (holding that "mere omission from 18 U.S.C. 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced" and distinguishing between crimes requiring guilty knowledge/*mens rea* from strict liability offenses).

3. The Defense in paragraph 13 of its brief argues "knowing" is an insufficient *mens rea* and states that "It is clear that in order to state an offense under Article 104(2) the Government must allege that PFC Manning *intended* to give intelligence to the enemy." "Knowingly" is an evil mind *mens rea.* Article 104(2) does not require a specific intent or motive to give intelligence to the enemy.

4. The Government bill of particulars response to the question "How did PFC Manning knowingly give intelligence to the enemy?" that "PFC Manning knowingly gave intelligence to the enemy by transmitting certain intelligence, specified in a separate classified document, to the enemy through the WikiLeaks website." does not impact on whether the specification states an offense. The Bill of Particulars response states that the Government is prepared to prove the accused had actual knowledge he was giving intelligence to the enemy.

5. The specification of Charge I includes all of the elements of the offense, fairly informs the accused of the charge against which he must defend, and protects the accused against double jeopardy.

6. The specification of Charge I states an offense.

7. That said, the Government requests the Court to adopt the instructions for Article 104(2) Giving Intelligence to the Enemy that are in the *Military Judge's Benchbook*. The Court will give the instructions in the *Benchbook* but notes that there is no "knowledge" instruction or instruction of what is meant by "indirect means". The Court proposes to give a knowledge instruction along the lines of the following:

"Knowingly means Giving Intelligence to the Enemy under Article 104(2) requires actual knowledge by the accused that he was giving intelligence to the enemy. This is true whether the giving of intelligence is by direct or indirect means. A person cannot violate Article 104 by acting inadvertently, accidentally, or negligently." *See* MCM, Paragraph 28c(5)(c)). *U.S. v. Olson,* 20 C.M.R. 461 (A.B.R. 1955).

The Court proposes to give an instruction on "indirect means" along the lines of the following:

"Indirect means" means that the accused knowingly gave the intelligence to the enemy through a 3rd party or in some other indirect way. The accused must actually know that by giving the intelligence to the 3rd party that he was giving intelligence to the enemy through this indirect means."

The Court invites the parties to propose "knowledge" and "indirect means" instructions.

Conclusions of Law: Void for Vagueness – Term Indirectly.

1. The offense of aiding the enemy is not a new or novel offense. *United States v. Olson*, 22 C.M.R. 250, 256, (C.M.A. 1957) ("The offense of aiding . . . the enemy or . . . giving . . . him intelligence is almost as old as warfare itself, and traces of what is clearly the conceptual forefather of . . . Article 104 of the Code may be found in the earliest of recorded military codes."); *U.S. v. Batchelor,* 22 C.M.R. 144 (1956) (aiding the enemy has been an offense in every military code since The American Articles of War in 1775).

2. The Defense argues that the Government's theory is that no criminal intent is required and that a person can violate Article 104(2) by disclosing information on the internet that might be accessible to the enemy. This is not consistent with the Government response in its Bill of Particulars.

3. The term "indirect means" describes the means by which a person knowingly gives intelligence to the enemy. The actual knowledge *mens rea* is the same whether the means of giving the intelligence is direct or indirect. The hypotheticals posed by the defense do not violate Article 104(2) because the person did not have actual knowledge that he/she was giving intelligence to the enemy by indirect means.

4. A Soldier of ordinary intelligence would be on notice that transmitting intelligence specified in a classified document to a website, without authority, with actual knowledge that the enemy used that website is prohibited conduct. The elements that the accused was acting without authority and the *mens rea* requirement of actual knowledge by the accused that he or she is giving intelligence to the enemy, does not encourage arbitrary and discriminatory enforcement of the statute.

5. The specification of Charge I (Giving Intelligence to the Enemy by Indirect Means) is not unconstitutionally vague. The Court will give instructions defining "actual knowledge" and "indirect means".

Conclusions of Law: Substantially Overbroad in Violation of the 1st Amendment.

The defense argues that Article 104(2) as charged in the specification of Charge I is substantially overbroad in violation of the 1st Amendment because persons making public statements would be subject to prosecution if the enemy could access it in some form. For the reasons set forth above, the Court finds that Article 104(2) (Giving Intelligence to the Enemy) requires an accused to act without authority, to have actual knowledge that he or she was giving intelligence to the enemy, whether the giving is by direct or indirect means. These elements ensure that Article 104(2)(Giving Intelligence to the Enemy) is not unconstitutionally overbroad and would not prohibit a substantial amount of Constitutionally protected speech.

Conclusion. The specification of Charge I states an offense and is Constitutional. The Court will provide appropriate instructions to fully inform the fact-finder of the elements of the offense and the definitions of "actual knowledge" and "indirect means". If, at trial, the Government does not prove the accused knew that by giving intelligence by indirect means, he actually knew he was giving intelligence to the enemy, the Court will entertain appropriate motions.

RULING: Defense Motion to Dismiss the specification of Charge I is **DENIED.** The Court will adopt the *Benchbook* instructions for Article 104(2) and supplement them with additional instructions regarding actual knowledge and indirect means.

ORDERED, this the 25th day of April 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit